



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tsuma v Tudor Services Ltd (Appeal E080 of 2021)  
[2023] KEELRC 1452 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1452 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E080 OF 2021**

**AK NZEI, J  
MARCH 9, 2023**

**BETWEEN**

**ROBERT MATANO TSUMA ..... APPELLANT**

**AND**

**TUDOR SERVICES LTD ..... RESPONDENT**

*(Being an appeal against the judgment of the Principal Magistrate  
– Hon. Lesootia Saitabau delivered on the 25<sup>th</sup> day of October,  
2021 at Mombasa in the in the Employment case No. E146 of 2020)*

**JUDGMENT**

1. The Appellant herein was the claimant in Mombasa CMC ELR Case No. E146 of 2020 whereby he sued the claimant alleging unfair termination of employment. The Appellant had pleaded as follows in his Memorandum of Claim dated 12<sup>th</sup> November 2020 and filed in the lower Court on even date:-
  - a. that the Appellant was engaged by the Respondent as a fuel loader on 14<sup>th</sup> October 2008, earning ksh. 16,788 at the time of his termination on 30<sup>th</sup> March 2019, and was being issued with payslips on payment of his wages.
  - b. that the Appellant was engaged on continuous renewable contracts until the time of his termination.
  - c. that by January 2014, the Respondent was paying the Appellant ksh. 15,759, which salary the Respondent reduced to ksh. 14,149 from February 2014 upto June 2015, which was unfair as a salary can only be increased or retained, but cannot be reduced.
  - d. that in July 2015, the Appellant's salary was increased to kshs. 14,959, which amount he earned upto October 2017, when the Appellant's salary was again increased to ksh. 16,788.



- e. that on 12<sup>th</sup> February 2018, the Respondent entered into another contract with the Appellant whose effective date was 1<sup>st</sup> January 2018 and was to run upto 31<sup>st</sup> December 2023; but on 30<sup>th</sup> March 2019, the Respondent terminated the Appellant's employment unprocedurally in Mombasa.
  - f. that upon termination of the Appellant's employment, the Respondent paid the Appellant ksh. 19,205 net by a payment voucher and issued him with a clearance certificate.
2. The Appellant pleaded that termination of his employment by the Respondent was unprocedural and unfair because:-
- a. the Appellant was not issued with any notice to show cause on any wrong doing.
  - b. there was no prior notice of the intended termination.
  - c. there was no meeting between the Appellant and the Respondent over the intended termination.
3. The Appellant had set out his claim against the Respondent as follows:-
- a. a declaration that termination of the Appellant's employment was unprocedural and unfair.
  - b. one month salary in lieu of notice.....ksh. 16,788
  - c. wage disparity from 1/2/2014 to 30/6/2016 (15,759-14,149)X17 months .....ksh. 27,370
  - d. wage disparity from 1/7/2015 to 1/10/2017 (15,759-14,957)X28 months .....ksh. 22,456.
  - e. severance pay @ 15 days wage per year for 10 years .....ksh. 83,940
  - f. maximum compensation for unfair termination of employment .....ksh. 201,456
  - g. compensation for remaining years of contract (16,788x 57 months ) .....ksh. 959,916
  - h. Certificate of Service.
  - i. costs of the suit and interest.
4. The Respondent defended the suit vide a memorandum of Response dated 4<sup>th</sup> December 2020. The Respondent denied the Appellant's claim and pleaded:-
- a. that the claimant was engaged as a Fuel Loader and earned ksh. 22,057 as at the time of termination.
  - b. that the Appellant was terminated by effluxion of time and upon issuance of one month's notice (in accordance) with the employment contract.
  - c. that the claimant was not entitled to severance pay in terms of Section 35(6) (d) of the [Employment Act](#) 2007 because his NSSF deductions were duly remitted.
  - d. that the memorandum of claim did not disclose any cause of action.



5. At the trial before the trial Court, the Appellant adopted his filed witness statement as his testimony and produced his seven (7) listed documents in evidence. He further told the Court that he was employed by the Respondent as a Fuel Loader on 14/10/2008 and was terminated on 30/3/2019, and that he was earning ksh. 16,788 at the time of termination. The Appellant testified that his salary was reduced from ksh. 15,759 to ksh. 14,149 as from February 2014. That his last contract was signed on 12<sup>th</sup> February 2018 and was to lapse on 21<sup>st</sup> December 2023. One of the documents produced in evidence by the Appellant was his last fixed term contract commencing on 1<sup>st</sup> January 2018 and terminating on 31<sup>st</sup> December 2023. The contract is shown to have been executed by both the Appellant and the Respondent on 12<sup>th</sup> February 2018. The Respondent (RW-1) never denied having executed this contract.
6. Cross-examined, the Appellant testified that he was employed on fixed term contracts, which were different from the ones he exhibited in Court. He denied having been issued with a termination notice.
7. On its part, the Respondent called one witness, Patrick Were Katamu (RW-1), who adopted his filed witness statement as his testimony. He further testified that the Appellant's contract expired in March 2019, and that the Appellant was given a termination notice. That the Appellant was paid salary within the minimum wage.
8. Cross-examined, RW-1 testified that the Appellant was employed on various short-term contracts from 2008. Among the documents produced in evidence by the Respondent were signed and unstamped resolution of the Respondent's directors authorising RW-1 to represent the Respondent in the lower Court suit and to sign Court documents thereon on behalf of the Respondent. The Respondent also produced an unstamped letter dated 28<sup>th</sup> February 2019 titled "End Of Employment Service" And Addressed "to Tudor Services Employees/ola Energy Terminal." The said letter, which was not addressed to the Appellant, was not shown to have been served on or delivered to the Appellant or to any other employee of the Respondent.
9. Having taken evidence from both parties, the trial Court delivered its judgment on 25<sup>th</sup> October 2021, making a finding that termination of the Appellant was fair. The Court awarded the Appellant ksh. 4,096.75 being underpayment and ksh. 83,940 being service pay; a total of ksh. 88,036.75. the Court also directed that the Appellant be issued with a certificate of service and ordered each party to hear its own cost of the claim. It is to be noted that the Appellant had not made a claim for service pay. The Court rendered itself as follows regarding the contract taking effect on 1<sup>st</sup> January 2018 and terminating on 31<sup>st</sup> December 2023:-

"I have carefully examined employment contracts produced by the claimant and that exhibited by the Respondent, while both contracts bear signatures of the claimant and RW-1, both witnesses dispute their signatures as appearing in other documents. Be that as it may and while I am not a hand writing expert, the contract exhibited by the Respondent bears the Respondent's stamp while the one exhibited by the claimant doesn't. A contract of employment is a record of employment, under the provisions of Section 74 of the Employment Act 2007, the same is maintained by the Respondent the employer in the circumstances. Unless proved otherwise, the contract document produced by the Respondent in my view is more authoritative and deemed genuine. With evidence that the Respondent engaged employees on short term renewable contracts, there is reason to believe that indeed, the Respondent engaged the claimant from 1<sup>st</sup> October 2018 upto 31<sup>st</sup> March 2019 (6 months) as opposed to 1<sup>st</sup> January 2018 to 31<sup>st</sup> December 2023."



10. Aggrieved by the said judgment, the Appellant lodged the present appeal and raised four grounds of appeal, which I summarise as follows:-
  - a. the trial magistrate erred in law and fact by ignoring the contract form signed by both the Appellant and the Respondent and finding that the last contract was not for five years but was for six (6) months.
  - b. the learned trial magistrate erred in law and fact by finding that the Appellant's employment contract was not terminated unfairly but lapsed with time on fixed term contract.
  - c. the learned trial magistrate erred in law and fact by finding that the Respondent's letter dated 28/2/2019 was served upon the Appellant as a notice despite that the same was not addressed upon the Appellant.
  - d. the trial magistrate erred in law and fact by dismissing the Appellant's prayers as prayed.
11. This is a first appeal. A first appeal is by way of a re-trial. It was held as follows in the case of *MURSAL & ANOTHER -VS- MUNENE (suing as the legal administrators of Dalphine Kanini Manesa)* CIVIL APPEAL NO. E20 OF 2021 [2020] KEHC 282 [KLR]:-

“A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another -vs- Associates Motor Boat Co. Ltd & Another* [1968] E.a. 123 And In *Peters -vs- Sunday Post Ltd* [1958] E.A. page 424.”
12. The Court in the *Mursal case* (supra) further states:-

“a first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for reviewing, both on questions of fact and law. A first appellate Court is the last Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust....”
13. I will handle the four grounds of appeal together, and in so doing I will determine the following issues, which in my view, fall for determination:-
  - a. whether the Appellant and the Respondent executed a fixed term contract of employment on 12<sup>th</sup> February 2018 commencing on 1<sup>st</sup> January 2018 and terminating on 31<sup>st</sup> December 2023.
  - b. whether the Appellant's employment was terminated unfairly by the Respondent.
  - c. whether the Appellant is entitled to the reliefs that were sought in the trial Court.
14. On the first issue, both the Appellant and the Respondent testified that the Appellant was employed by the Respondent on short term contracts from the year 2008. The Appellant exhibited the first such fixed contract (for a period of nine months from 14<sup>th</sup> July 2008 upto 31<sup>st</sup> March 2009). The written contract is shown to have been executed by both parties herein on 15<sup>th</sup> August 2008, and does not bear the Respondent's stamp or seal. The Respondent did not dispute the authenticity of this contract.



15. The Appellant also exhibited his last fixed term contract, shown to have been executed by both parties on 12<sup>th</sup> February 2018. The contract is shown to have taken effect on 1<sup>st</sup> January 2018 and was to terminate on 31<sup>st</sup> December 2023. The Respondent did not, dispute having executed that contract. Indeed, all that the Respondent (RW-1) told the trial Court was that the last fixed term contract that it executed with the Appellant expired in March 2019, and produced in evidence a fixed term contract shown to have been executed on 25<sup>th</sup> October 2018 for the period commencing on 1<sup>st</sup> October 2018 and terminating on 31<sup>st</sup> March 2019.
16. Though shown to have been executed on 25<sup>th</sup> October 2018, over eight months after execution of the five years fixed term contract executed by the parties herein on 12<sup>th</sup> February 2018, the former contract did not refer to the latter contract, and did not in any way either cancel it or alter its terms and conditions. It is my finding that the Appellant and the Respondent executed a fixed term contract of employment on 12<sup>th</sup> February 2018, commencing on 1<sup>st</sup> January 2018 and terminating on 31<sup>st</sup> December 2023.
17. On the second issue, the Respondent did not deny having terminated the Appellant’s employment in March 2019. Indeed, the Respondent exhibited a purported termination notice dated 28<sup>th</sup> February 2019 which was not addressed to the Appellant or to any one in particular, and was not shown to have been served on the Appellant or to have been received by him. The Respondent maintained that termination of the Appellant’s employment was fair, while the Appellant pleaded and testified that the termination was unfair.
18. Whereas Clause 12 of the Appellant’s said contract of employment clearly provided that the contract of employment could be terminated by either party giving a one month notice, the Respondent did not issue any termination notice to the Appellant. To that extend, the termination was wrongful and therefore unfair.
19. Further, the Appellant’s contract of service was one to which Section 35(1) (c) of the *Employment Act* applied. The Respondent did not issue a termination notice to the Appellant. To that extend, termination of the Appellant’s employment was unlawful and therefore unfair within the meaning of Section 45 of the *Employment Act*.
20. Further, the Respondent did not give the Appellant any reasons for termination of his employment, and the Appellant was not given an opportunity to be heard before termination of his employment. The Court of Appeal held as follows in the case of *CMC Aviation Limited -vs- Mohammed Noor*: -

“In view of the foregoing, we find that the Appellant’s act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the *Employment Act*. In Kenya Union Of Commercial Food And Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also MARY CHEMWENO KIPTUI –VS –KENYA PIPELINE COMPANY LIMITED [2014] eKLR”
21. It is my finding that termination of the Appellant’s employment by the Respondent was unfair, and I so declare. I fault the trial Court’s finding in the contrary.



22. Having made a finding that termination of the Appellant's employment was unfair, I award the Appellant the equivalent of nine months' salary being compensation for unfair termination of employment. That is ksh. 16,788x9 = ksh. 151,092. I also award the Appellant ksh. 16,788 being one month salary in lieu of notice.
23. The claim for wage disparity was not proved, and is declined. It was a common ground that the Appellant was employed by the Respondent on various fixed term contracts since the year 2008. The wages/salary payable to the Appellant under each fixed term contract was that agreed upon in that particular contract, and the trial Court was not told that any such fixed contracts provided for a wage below the legal minimum; and no evidence was led in that regard.
24. The claim for severance pay is not available to the Appellant as termination of his employment was not on account of redundancy under Section 40 of the Employment Act, 2007. The same is declined.
25. The claim for the remaining years of contract is declined as the same is not available to the Appellant under Section 49(1) of the Employment Act.
26. I uphold the trial Court's finding on issuance of a certificate of service to the Appellant.
27. Finally, and having considered written submissions filed by counsel for both parties herein, I hereby set aside the trial Court's judgement delivered on 25<sup>th</sup> October 2021, save for the finding on issuance of certificate of service, and enter judgment for the Appellant against the Respondent as follows:-
  - a. Compensation for unfair termination of employment .....ksh. 151,092
  - b. One month salary in lieu of notice .....ksh. 16,788Total ksh. 167,880
28. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
29. The Respondent shall issue the Appellant with a certificate of service within thirty days of this judgment.
30. The Appellant is awarded costs of the appeal herein and of proceedings in the Court below.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> MARCH 2023**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE.

Appearance:

.....for Appellant

.....for Respondent

